IN THE

Supreme Court

OF THE

United States

EDWARD C. SCHUBERT, JOHN T. [illegible]
WILLARD B. HOWELL,

Petitioners,

vs.

A. BIRCH & SONS CONSTRUCTION CO., a [illegible]
and MORRISON-KNUDSEN CO., a corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Harmon Printing & Binding Company, Seattle

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

EDWARD C. SODERBERG, JOHN J. KISSANE and WILLARD B. HOWELL,

Petitioners,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSON CO., a corporation,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To: The Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

EDWARD C. SODERBERG, JOHN J. KISSANE and WILLARD B. HOWELL respectfully petition this Court to issue a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. The Circuit Court of Appeals (Judges Garrecht, Matthews and Healy) rendered its judgment July 9, 1947 (R. 643). The decision, reported at ..... F.(2d) ....., affirmed a final judgment of the District Court of the Western District of Washington, Northern Di-

vision, in favor of respondents as to the periods of employment of the respective claimants here involved, denying petitioners any recovery for overtime wages alleged to be due under the Fair Labor Standards Act of 1938, 29 U.S.C. 207 (a) and 216 (b). The District Court's opinion is not reported but appears at R. 611-618. The opinion by the Circuit Court of Appeals appears at R. 633-642.

SUMMARY STATEMENT OF MATTER INVOLVED

This is an action for overtime compensation under the Fair Labor Standards Act of 1938. This petition is sought on behalf of petitioners and 26 former employees of respondents.

The regular rate of pay, the number of overtime hours and the amounts due petitioners as assignees of the employees are all admitted and are noted in the margin.[1]

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[1]The employees worked for a stipulated salary per 48-hour week. The regular rate of pay was 1/48 of the stipulated salary. They had a uniform work week of 70 hours per week at the rate of 10 hours per day for which they were paid their stipulated salary for 48 hours and two times their regular rate for the 10 hours occurring on their seventh day of the week. They have thus due them one-half their regular rate for the hours between 40 and 48 each week; 1½ times their regular rate for the hours each week between 48 and 60. The overtime compensation due under the Act, together with an equal amount as liquidated damages for the respective claimants, is as follows:

Name	Cause of Action	Amount Due
Edgar W. Scheid	18th	$1303.74
Edward C. Soderberg	2nd	2144.38

The issue is whether the duties of the claimants are activities in "commerce," which in turn, is dependent upon whether the goods upon which they worked are in "commerce."

The United States Government entered into cost-plus-a-fixed-fee contracts with respondents for the latter to build fortifications in the Aleutian Islands, Alaska (R. 184).

Ninety-four per cent of the supplies for such buildings were ordered by the Government and six per cent by the respondents. Title to such goods was vested in the Government, usually at the vendor's place of business, directly from the vendor and not through the respondents (R. 185).

Willard B. Howell	3rd	2053.12
James A. Stewart	13th	417.08
Louis D. Mayfield	15th	1350.42
William H. Taylor	23rd	696.04
John N. Sinema	24th	1660.20
V. Herbert Showalter	22nd	872.08
Edward A. Cox	29th	297.92
Clifford S. Wilcox	30th	1313.54
D. A. Buchanan	37th	476.66
Louis A. Krampert	38th	665.62
Gilford N. Brown	60th	430.62
Clarence F. Kouns	64th	297.92
Miles J. Hazelberg	7th	1253.96
DeWitt T. Ferrell	8th	465.84
Louis R. Strini	17th	1153.74
William L. Downs	33rd	476.66
Charles E. Roach	61st	920.82
Edgar R. Ayres	67th	2137.50
J. Frank Lindgren	10th	1868.76
John L. Robinson	68th	323.74
Henry Gordon Law	77th	1608.74
Henry B. Stockemer	62nd	1310.82
Orville D. Smith	80th	1083.32

These goods were transported by rail and truck to Seattle (R. 185), crated by Government or private companies; shipped by boats operated by the War Shipping Administration, or the Transportation Corps without charge to respondents, to the particular Island in the Aleutian group where the goods were to be used (R. 186).

On arrival at each of the respective islands, the boats were unloaded by Army Personnel, who also moved the goods to a sorting or classification yard one-half mile away operated by the Army (R. 186). In this yard respondents had two employees, assignors of petitioners, and claimants[2] herein, classified as "expediters," whose duties consisted of claiming the materials, supplies and equipment to be used by the respondents from those to be used by other cost-plus-a-fixed-fee contractors at the Island (R. 187).

From this yard the goods so claimed by the two expediters were transported by Government trucks operated by Army or respondents' personnel to government owned warehouses, occupied and used by the respondents.

At one of the islands (Project 502), all materials were transported from the yard to central warehouses (R. 187-188), where the respondents had thirteen employees working, assignors of the petitioners, and claimants.[3] The duties of these

[2]Edgar W. Scheid, Eighteenth Cause of Action, and John L. Robinson, Sixty-eighth Cause of Action. (R. 187)

[3]Willard B. Howell, Third Cause of Action; James A. Stewart, Thirteenth Cause of Action; Louis D.

warehousemen were to tally or list the goods received, transfered or issued, properly stow the goods and maintain perpetual inventories and make receiving reports of the goods received in the warehouses (R. 188).

Resale goods for Project 502 were thereafter transported from the central warehouse to the resale warehouse (R. 188, 191), where the respondents had five employees working, who are assignors of the petitioners, and claimants herein.[4] The duties of these five employees were to keep records of the transfer of supplies to the resale warehouse, and from the resale warehouse to the commissary store (R. 191-192).

The resale goods were then transported from the resale warehouse to the commissary store, where the respondents had two employees working, assignors of petitioners, and claimants[5] herein. The

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Mayfield, Fifteenth Cause of Action; William H. Taylor, Twenty-third Cause of Action; John H. Sinema, Twenty-fourth Cause of Action; V. Herbert Showalter, Twenty-second Cause of Action; Edward A. Cox, Twenty-ninth Cause of Action; Clifford S. Wilcox, Thirtieth Cause of Action; D. A. Buchanan, Thirty-seventh Cause of Action; Louis A. Krampert, Thirty-eighth Cause of Action; Gilford N. Brown, Sixtieth Cause of Action; Edward C. Soderberg, Second Cause of Action; Clarence F. Kouns, Sixty-fourth Cause of Action. (R. 189-190, 192)

[4]Miles J. Hazelberg, Seventh Cause of Action; DeWitt T. Ferrell, Eighth Cause of Action; Louis R. Strini, Seventeenth Cause of Action; William L. Downs, Thirty-third Cause of Action; Charles E. Roach, Sixty-first Cause of Action. (R. 193)

[5]J. Franl. Lindgren, Tenth Cause of Action;

duties of these two employees consisted of making lists of goods received, inventories of goods on hand, and a monthly commissary report, and selling the goods over the counter to the construction workers and soldiers on the Island (R. 191, 192). All receipts, including profits, from the commissary were transmitted to the Government (R. 191).

The balance of the goods at Project 502 went from the central warehouses to storage warehouses for issuance as needed (R. 188).

At Project 500 resale goods went directly from the yard to the resale warehouse (R. 187), where respondents had one employee working, assignor of the petitioners, and a claimant[6] herein, whose duties were the same as the resale warehousemen at Project 502 (R. 191-192). From the resale warehouse, the resale goods were transported to the commissary where the respondents had two employees working, assignors of the petitioners, and claimants[7] herein, whose duties were the same as the resale commissary clerks at Project 502 under identical conditions (R. 191, 192).

The balance of the goods at Project 500 were transported from the yard to the central warehouse (R. 187), where the respondents had one employee working, assignor of the petitioners, and a claim-

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V. Herbert Showalter, Twenty-second Cause of Action. (R. 193)

[6]Edgar R. Ayres, Sixty-seventh Cause of Action. (R. 193)

[7]John L. Robinson, from July 3, 1944, to August 3, 1944, Sixty-eighth Cause of Action; and Henry Gordon Law, Seventy-seventh Cause of Action. (R. 194)

ant[8] herein, whose duties were the same as the central warehousemen at Project 502 (R. 188). From the central warehouse, the goods were transported to storage warehouses, where the respondents had one employee working, assignor of the petitioners, and a claimant[9] herein, whose duties were identical to central warehousemen (R. 188). From the storage warehouses the goods were issued as needed to the projects.

270 million pounds of materials, supplies and equipment followed the foregoing route during the period here involved (R. 185).

The foregoing statement of facts is drawn from the Findings of Fact (R. 182-194).

The District Court concluded that the duties of the two expediters, thirteen central warehousemen, five resale warehousemen, two commissary clerks at Project 502; and one resale warehouseman and two commissary clerks at Project 500 were not within the coverage of the Act because the respondents' principal activity was to build a military base (R. 612). The Circuit Court of Appeals held merely that the petitioners had not sustained their burden of proof (R. 641) ..... F.(2d) at page .....

REASONS RELIED ON FOR ISSUANCE OF WRIT

As in *National Labor Relations Board v. Waterman Steamship Co.*, 309 U.S. 206, 208 (1940), this Court should review a factual question in this case because the Circuit Court of Appeals has short-

[8]Henry B. Stockemer, Sixty-second Cause of Action. (R. 190)

[9]Orville D. Smith,Eightieth Cause of Action. (R. 190)

circuited Findings of Fact, which neither party attacked, to hold:

a. The plaintiffs have failed to sustain their burden of proof of interstate commerce; and thus
b. That the duties of warehousemen at successive intrastate steps to get goods to their final destination, and in receiving goods at their final destination, such goods having been transported from without the state, are not activities in interstate commerce, contrary to the rule of *Walling v. Jacksonville Paper Company*, 317 U.S. 564.

PRAYER

WHEREFORE, Your petitioners pray that this Honorable Court issue its writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit, said Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the records and proceedings in the instant case, to the end that said case may be reviewed and determined by this Court, as provided by law, and that said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court.

Dated at Seattle, Washington, this 19 day of Sept., 1947.

Respectfully,

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BRIEF

This is an action for overtime compensation brought under the Fair Labor Standards Act of 1938, 52 Stat. 1063, 29 U.S.C., Sections 201-219. Under Section 7 (a), the employer is required to pay for excess hours of work not less than one and one-half times the regular rate.[10]

An employer who violates this sub-section is liable to his injured employees in the amount due and unpaid and an additional equal amount as liquidated damages.[11]

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[10]Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce * * * for a work week longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *

[11]Sec. 16. (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves any other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The Court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant and costs of the action.

DATES OF JUDGMENT BELOW AND REFERENCE TO OFFICIAL REPORTS

The district court entered its judgment November 9, 1945 (R. 217). Its opinion is not reported but appears on R. 611-618. The circuit court of appeals entered its judgment July 9, 1947 (R. 643). Its decision is reported at ..... F.(2d) ..... and at (R. 633-642). This petition is served and filed within three months from July 9, 1947, 28 U.S.C. Section 350.

SPECIFICATION OF ERRORS

The circuit court of appeals erred as follows:

1. In relying upon a conclusion of law that the claimants' duties "were not in commerce, or in the production of goods for commerce," found in the findings of fact *as a finding* of fact.

2. In refusing to be bound by findings of fact of the district court setting forth the route of the goods alleged to be in commerce and the duties of the claimants in respect to such goods.

3. In holding that the claimants had not sustained their burden of proof of establishing their respective duties as being in commerce.

4. In holding that the duties of warehousemen at successive intrastate steps to get goods to their final destination and in receiving goods at their final destination, such goods having been transported from without the state, are not activities in interstate commerce.

ARGUMENT

This case involves simply a refusal by the circuit court of appeals to apply the rule of *Walling v.*

Jacksonville Paper Co., 317 U.S. 564, to warehousemen handling and receiving out-of-state goods prior to and at their final destination.

The rationale of the circuit court of appeals is, however, that the claimants failed to sustain their burden of proof and so we must first direct our attention to two procedural problems, stated in our first two specifications of error.

This petition is based upon the findings of fact of the district court, which neither party attacked. In these findings, the district court inserted an additional sentence that the claimants and each of them "were not engaged in commerce or in the production of goods for commerce" within the meaning of the Act (R. 187, 188, 192) reiterated as a conclusion of law (R. 208).

The circuit court of appeals asserted the district court "found" the claimants were not employed in commerce (R. 636) and concluded the "finding" was correct (R. 641) by short-circuiting the balance of the findings and examining the testimony and stipulations in the record which were never collected by either counsel for review by the court as to these claimants. This so-called "finding" relied on by the circuit court of appeals is not a "finding" at all. It is a conclusion of law or an ultimate fact, *Norris v. Jackson*, 76 U.S. 125, for which a reviewing court can substitute its own judgment without a presumption of correctness, *Bogardus v. Commissioner*, 302 U.S. 35, 39. Cf. *Winnett v. Helvering* (C.C.A. 9, 1934) 68 F.(2d) 614, 615.

THIRD AND FOURTH SPECIFICATION OF ERRORS

The real issue, in our view, is whether the handling of out-of-state goods at successive intrastate warehouses and the receiving of them at their final destination, the commissary store or storage warehouses, are within the rule of the *Jacksonville Paper Co.* case.

The rule is found at 317 U.S. at page 567-568 and may be described as follows: the interstate journey continues up to the point where the parties at the inception of the movement intended the goods to go.

Neither lower court has made a finding of where the final destination of these goods was. It is plain, however, from the findings of fact, that the 130,000 tons of goods were purchased and transported to sell over the counter in the commissary and to build a military base in Alaska. That these two, and only these two, were their final destination for the respective types of goods, was known from the moment of their being purchased. It was neither at the dockside, nor the sorting yard, nor the central warehouse, nor the storage warehouses. It was still later in their route, namely: at the commissary and at the construction site.[12]

Our interpretation of the *Jacksonville Paper Co.* case is confirmed by *Walling v. American Stores*, 133 F.(2d) 840, (C.C.A. 3) where the intrastate movement of out-of-state goods at issue was from

[12]It is unnecessary to determine that the construction site was the final destination, because none of the claimants worked at such point and hence it is not at issue, the claimants having worked at an earlier step in the interstate journey.

warehouses to retail stores; by the Administrator of the Wage & Hour Division, Department of Labor, in a statement issued by him in March, 1946, 1947 W.H. Man. p. 9; by *Mid Continent Petroleum Corp. v. Keen* (C.C.A. 8) 157 F.(2d) 310; and by *Walling v. Herlihy*, 161 F.(2d) 568 (C.C.A. 4)

We now turn to the duties performed by the respective groups of claimants. From the docks the goods were transported to a sorting yard where two of the claimants classified as "expediters" claimed respondents' goods from those consigned to other cost-plus-a-fixed fee contractors. From the sorting yard, the goods were transported to central warehouses where thirteen claimants tallied or listed the goods received, transferred, or issued, properly stowed the goods and maintained perpetual inventories and made receiving reports in the warehouse. The resale goods were thence transported to the resale warehouse where five claimants worked who kept records of the transfer of supplies to the resale warehouses and from the resale to the commissary store. The resale goods were thence transported to the store where two claimants worked whose duties were to make lists of goods received, inventories of goods on hand, a monthly commissary report and to sell the goods over the counter to the construction workers and soldiers on the Island. There are no claimants involved at Project 502 who worked in the storage warehouse where construction supplies were stored. The construction supplies were transported from the central ware-

house to storage warehouses and thence issued as needed.

It is thus plain that the duties of these claimants and the route of the 130,000 tons of goods distinguish this case from *Higgins v. Carr Bros. Co.*, 317 U.S. 572, and cases having similar facts.[13]

In each of this latter group of cases, no one knew where the goods were going after deposit in the warehouses, for the employers-wholesalers sold them to a miscellany of stores, and the duties of the claimants occurred after the goods arrived at the warehouses. Here, the expediters worked on the goods prior to arrival at the warehouses; the central warehousemen checked the goods in and out of the central warehouse; the resale warehousemen checked the resale goods in and out of the resale warehouse; the commissary clerks checked the resale goods in at the commissary and the storage warehousemen checked the goods in and out of the storage warehouse to the construction project. Here the goods invariably followed a fixed pattern to specified points: to the commissary and at least to the storage warehouses for issuance as needed.

Government title to the goods does not make its transportation an administrative act of the government and hence not commerce (if that be a valid doctrine, for we have found no case of this court, nor has counsel cited any, to support it), for the "particular point at which title and custody * * *

[13] *Domenech v. Pan American Standard Brands*, 147 F.(2d) 994 (C.C.A. 1); *Jewel Tea Co. v. Williams*, 118 F.(2d) 202 (C.C.A. 10).

pass to the purchaser without arresting its movement to the intended destination, does not affect the essential interstate nature of the business." *Illinois Natural Gas Co. v. Public Service Comm.*, 314 U.S. 498, 503-504; cf. *Rearick v. Pennsylvania*, 203 U.S. 507. "The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved." *Illinois Central R. R. Co. v. Louisiana R. R. Comm.*, 236 U.S. 157, 163; *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 569.

No claim has been advanced by respondents that the claimants are employees of an instrumentality of the United States and thus in reality employees of the United States, and thus in turn within the exception of the definition of employer of Section 203 (d).[11]

Some claim has been advanced by respondents that transportation by or for the convenience of the government is not commerce but an administrative act of sovereignty in the conduct of its war, referring to the fact that the goods were transported from Seattle to Alaska by ships of the Transportation Corps or the War Shipping Administration.

A short answer to that is that the respondents, private corporations, did the warehousing and re-

[11]Sec. 203 (d) reads as follows: "Employer includes any person acting directly or indirectly in the interests of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a state, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

ceiving for a fee. Moreover, other segments of the interstate journey were effected by private parties, namely: transportation throughout continental United States to Seattle by truck and rail and thus respondent's contention is not at issue.

Moreover, the transportation from Seattle to Alaska by such government agencies must have been considered "commerce" because the primary purpose of such transportation is the movement of cargo as such, as distinguished from the movement of a battleship, or other combat vessels, *Divins v. Hazeltine Electronics Corp.* (1947, C.C.A. 2) 162 F.(2d) ....., 12 C.C.H. Labor Cases, Par. 63,828.

The lower court could not have been impressed by the argument, for on June 20, 1946, it held that communication, transportation and transmission for private persons by combat vessels (e.g. battleships) was "commerce" in *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F.(2d) 334. Insofar as the goods here involved are concerned, that decision is in accord with: *Divins v. Hazeltine Electronics Corp.*, 162 F.(2d) * * * (C.C.A. 2) (armed cargo carriers are in "commerce"); *Clyde v. Broderick*, 144 F.(2d) 348, 350 (C.C.A. 10, 1944) (private goods transported for the convenience of the government is "commerce"); *Bell v. Seton Porter*, 155 F.(2d) 49 (C.C.A. 7, 1946) cert. denied 91 L. ed. 927 (munitions are produced for "commerce" when later transported by and for the government); *Walling v. Patton-Tulley Transp. Co.*, 134 F.(2d) 945 (C.C.A. 6, 1943); *Umthum v. Day & Zimmerman*, 16 N.W.(2d) 258, 235 Iowa 293 (mu-

nitions are produced for "commerce" when later transported by commercial railroads.)[15]

Moreover, the lower courts have unanimously held that purchasing or intermediate handling of government-owned goods by employees of cost-plus-a-fixed-fee contractors for military bases is an activity in commerce[16] and there can be no logical distinction between purchasing such goods as in the cited cases and continuing the interstate transportation at successive intrastate steps to their final destination and there receiving them as in the instant case, for both are directly essential to the movement of the goods.

Goods moved interstate are in commerce even though they never enter the field of commercial

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[15]Other lower court cases where such transportation was either conceded or decided as "commerce" are: *Gorchakoff v. California Shipbuilding Corp.*, 63 F. Supp. 309 (D. C. Cal., 1945); *Peffer v. Federal Cartridge Corp.*, 63 F. Supp. 291 (D.C. Minn., 1945); *Ashworth v. Badger & Sons Co.*, 63 F. Supp. 710; *Timberlake v. Day & Zimmerman*, 49 F. Supp. 28, 33; *Bowers v. Remington Rand*, 64 F. Supp. 620, 625 (D.C. Ill.); *Anderson v. Federal Cartridge Corp.*, 62 F. Supp. 775 (D.C. Minn.), affirmed on other issues 156 F.(2d) 680 (C.C.A. 8, 1946).

Cases contra are: *Deal & Co. v. Leonard*, 196 S.W. (2d) 991, ... Ark. ....; *Silas Mason v. Kennedy*, 68 F. Supp. 578 (D.C. La.); *Barksdale v. Ford, etc.*, 70 F. Supp. 690.

[16]*Lassiter v. Guy F. Atkinson Co.* (W.D. Wash., 1945) unreported opinion, affirmed on other issues (C.C.A. 9, 1947) 162 F.(2d) ....; *Simkins v. Elmhurst Construction Co.*, 46 N.Y.S.(2d) 26, affirmed 50 N.Y.S.(2d) 408 (1944); *Steiner v. Pleasantville Constructors Co.*, 46 N.Y.S.(2d) 120, affirmed 49 N.Y.S.(2d) 42.

competition, *Atlantic Co. v. Walling* (C.C.A. 5, 1943) 131 F.(2d) 518, and *United States v. Underwriters Ass'n.*, 322 U.S. 533, 553, where this Court recalls the great cases involving non-commercial commerce.

Fleming v. Jacksonville Paper Co., 128 F.(2d) 395-398, held that those who sell or deliver across state lines or buy and receive across state lines are employees in commerce whether they write the letters, keep the books, or load and unload, or drive the trucks. In this respect the circuit court of appeals was affirmed by this court in *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, at page 572. The foregoing duties likewise satisfy the requirements of *McLeod v. Threlkeld*, 319 U.S. 491, because the goods upon which the claimants worked were themselves in commerce, as distinguished from the cook, who fed the construction workers who worked on the railroad in the *Threlkeld* case.

CONCLUSION

That the conclusion of law which must follow from the evidentiary findings in this case is that the claimants, and each of them, are engaged in "commerce," as defined by the Fair Labor Standards Act of 1938, and the reliance by the circuit court of appeals on a factual resume' of the record not offered by either counsel in order to disregard *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, should cause this court to issue its writ of certiorari to the circuit court of appeals and to reverse its decision.

Respectfully,

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